(8)

No. 94-23

In The

Supreme Court of the United States

October Term, 1994

CITY OF EDMONDS,

Petitioner,

v.

WASHINGTON STATE
BUILDING CODE COUNCIL, ET AL.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF OF TOWNSHIP OF UPPER ST. CLAIR AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
INTEREST OF AMICUS CURIAE	1
SUMMARY OF ARGUMENT	5
ARGUMENT	6
1. The Plain Language Of The Exemption Encompasses Petitioner's Occupancy Limitations	6
2. If Congress Intends To Pre-Empt The Historic Powers Of The States, It Must Make Its Intention To Do So Unmistakably Clear In The Language Of The Statute	17
CONCLUSION	23

TABLE OF AUTHORITIES

Page

CASES:

Atascadero State Hospital v. Scanlon, 473 U.S. 242 (1985) 18, 20

Berman v. Parker, 348 U.S. 26 (1954) 19

Blanchard v. Bergeron, 489 U.S. 87 (1989) 11

City of Edmonds v. Washington State Building Code Council, et al., 18 F.3d 802 (9th Cir. 1994) 8, 10, 13, 15

Conroy v. Aniskoff, 113 S. Ct. 1562 (1993) 11

Cox et al. v. Township of Upper St. Clair, C.A. No. 93-1443 (E.D.Pa. May 18, 1994) 2

Elliott v. City of Athens, Ga., 960 F.2d 975 (11th Cir.), *cert. denied*, 113 S. Ct. 376 (1992) 2, 4, 12, 13

Freytag v. Commissioner, 111 S. Ct. 2631 (1991) 8

Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985) 18

Green v. Boch Laundry Machine Co., 109 S. Ct. 1981 (1989) 12

Gregory v. Ashcroft, 111 S. Ct. 2395 (1991) 18, 20, 21

Lane County v. Oregon, 7 Wall. 71, 19 L.Ed. 101 (1869) 18

Moore v. City of East Cleveland, 431 U.S. 494 (1977) ..9, 13

Nelson v. City of Seattle, 64 Wash.2d 862, 395 P.2d 82 (1964) 19

Pennhurst State School and Hospital v. Halderman, 465 U.S. 89 (1984) 20

Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947) 20

TABLE OF AUTHORITIES – Continued

Page

Tafflin v. Levitt, 493 U.S. 455 (1990) 17

Texas v. White, 7 Wall. 700, 10 L.Ed. 227 (1869) 18

United States v. Bass, 404 U.S. 336 (1971) 20

Village of Belle Terre v. Boraas, 416 U.S. 1 (1974)...19, 22

Village of Euclid v. Ambler Realty Co., 262 U.S. 365 (1926) 19

Will v. Michigan Dept. of State Police, 491 U.S. 58 (1989) 20

STATUTES AND ORDINANCES:

Fair Housing Act, 42 U.S.C. 3601 *et seq.*:

§ 802, 42 U.S.C. 3602 15

§ 803(a), 42 U.S.C. 3603(a) 15

§ 803(b), 42 U.S.C. 3603(b) 16

§ 804, 42 U.S.C. 3604 7

§ 804(f), 42 U.S.C. 3604(f) 15

§ 804(f)(1)(A), 42 U.S.C. 3604(f)(1)(A) 7

§ 804(f)(1)(A), 42 U.S.C. 3604(f)(3)(A) 14

§ 804(f)(3)(B), 42 U.S.C. 3604(f)(3)(B) 7, 14

§ 804(f)(5), 42 U.S.C. 3604(f)(5) 14

§ 804(f)(5)(C), 42 U.S.C. 3604(f)(5)(C) 15

§ 807(b)(1), 42 U.S.C. 3607(b)(1) 2, 4, 7

TABLE OF AUTHORITIES – Continued

Page

Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 102 Stat. 1619:
§ 6(a), 102 Stat. 1620-1622 .....7, 13

Township of Upper St. Clair Zoning Code:
Section 130.3.80..... 3

Section 130.3.84..... 3

Edmonds Community Development Code:
§ 21.30.010 .....8, 9

MISCELLANEOUS:

H.R. Rep. No. 711, 100th Cong., 2d Sess. (1988)..... 10

Supreme Court Rule 37.5 1

Federal Rule of Civil Procedure 12(b)(6)..... 3

S. Breyer, *The 1991 Justice Lester W. Roth Lecture on the Uses of Legislative History in Interpreting Statutes*, 65 S.Cal.L.Rev. 845 (1992)..... 11

The Federalist No. 51 (C. Rossiter ed. 1961) (J. Madison)..... 19

D. Burch and S. Ryals, *Land Use Controls: Requiem for Zoning and Other Musings on the Year 1982*, 15 Urban Law. 879 (1983)..... 22

R. Anderson, *American Law of Zoning*, § 9.30 (1986) 22

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INTEREST OF AMICI CURIAE

Amicus curiae respectfully submits the within brief in support of the Petitioner. The Township of Upper St. Clair ("Township") is a political subdivision of the Commonwealth of Pennsylvania. Counsel to Amici curiae is the authorized law officer of the Township. Therefore, consent to the filing of this brief is not necessary. Supreme Court Rule 37.5.

The Township is concerned because the Township, like thousands of political subdivisions across the country, utilizes single family zoning as the basic building block for its zoning scheme. In drafting its definition of family, the Township believed that its definition was within the exemption to the Fair Housing Act set forth at 42 U.S.C. 3607(b)(1) which exempts certain regulations from scrutiny under the Fair Housing Act as a "reasonable local . . . restriction[ ] regarding the maximum number of occupants permitted to occupy a dwelling." *Id.*

The decision by the Court of Appeals for the Eleventh Circuit in *Elliott v. City of Athens, Ga.*, 950 F.2d 975 (11th Cir.), *cert. denied*, 113 S. Ct. 376 (1992) confirmed this understanding.

The concern of amicus curiae is a very realistic and immediate one. On August 31, 1993, Southwinds, Inc. ("Southwinds"), Residential Resources, Inc. ("Residential Resources"), and three mentally retarded persons filed a Complaint against Township in the United States District Court, Western District of Pennsylvania, at Civil Action No. 93-1443. Southwinds is a not-for-profit corporation which operates community residential programs for persons with mental retardation and is the residential service provider for the three mentally retarded persons. Residential Resources is a not-for-profit corporation which purchases properties to be used by persons with disabilities.

In their Complaint, plaintiffs alleged that the Township's Zoning Ordinance violates the Fair Housing Act, 42 U.S.C. § 3601, et seq. ("FHA"). On November 15, 1993,

the Township filed a Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). By Memorandum Opinion and Order dated May 18, 1994, Judge Maurice B. Cohill, Jr. of the United States District Court, Western District of Pennsylvania, denied the Township's Motion to Dismiss with respect to the claims under the FHA.

The case concerns the enforcement and propriety of a zoning ordinance enacted by the Township. (The Factual Statements in this Brief are from the Memorandum Opinion and Order.) For zoning purposes, the Township is divided into five residential zones, delineated R-1, R-2, R-3, R-4, and R-5. The three mentally retarded persons reside in an R-2 Zoning District. Township Code Section 130.9 defines those uses permitted in the R-2 Single-Family Residential District and limits permitted principal uses by right to Single-Family Dwellings. The Township Code defines single family dwelling in Section 130.3.80 as "A RESIDENTIAL DWELLING containing one (1) DWELLING UNIT occupied by one FAMILY and which is the only PRINCIPAL BUILDING on the LOT." On July 30, 1993, the Township issued a notice of violation to Residential Resources and Southwinds. The notice of violation charged Residential Resources and Southwinds with violating Township Code Section 130.3.84. The Township Zoning Code in Section 130.3.84 defines "FAMILY" as

> one (1) or more persons related by blood, marriage or adoption; or a group of not more than two (2) persons who need not be related by blood, marriage or adoption, who are living together in a DWELLING UNIT and maintaining a common household and practicing on a permanent basis a joint economic, social and cultural life. If two (2) persons are living

together unrelated by blood, marriage or adoption, the basis for the relationship cannot be therapeutic or corrective or the profit motive. In addition, temporary gratuitous guests or persons, such as domestic servants, employed by the FAMILY and who report to the FAMILY for supervision and decision making may reside with the FAMILY. FAMILY shall not be construed to include a PERSONAL CARE HOME, a GROUP HOME, or a GROUP LIVING ARRANGEMENT. Nothing in this definition shall be construed to prohibit providing a home for children under the age of eighteen (18) years who are foster children or are living with the FAMILY with the permission of their parent or legal guardian.

Plaintiffs alleged that the Township Zoning Code violates the FHA in that the Code discriminates against the three mentally retarded persons by, inter alia, prohibiting them from living in residential zones R-1 and R-2 and failing to provide them with reasonable accommodations, even though the Zoning Code does not distinguish between disabled and nondisabled unrelated persons. In its Motion to Dismiss, the Township argued that the Township's definition of family is within the exemption set forth at 42 U.S.C. 3607(b)(1) for the reasonable occupancy limitations of local government entities. Pursuant to this section of the FHA, the Township urged that its Code is merely a "reasonable . . . restriction[ ] regarding the maximum number of occupants permitted to occupy a dwelling." In support, the Township extensively relied on *Elliott v. City of Athens, Ga.*, 950 F.2d 975 (11th Cir. 1992), *cert. denied*, 113 S. Ct. 376 (1992), wherein the United

States Court of Appeals for the Eleventh Circuit considered a reasonable restriction exemption similar to the one proposed by the Township.

SUMMARY OF ARGUMENT

The plain language of the FHA exempts petitioner's occupancy restriction by exempting "any" reasonable maximum occupancy restriction. The language does not limit its terms to "absolute" maximum occupancy limitations. In an attempt to create ambiguity where there is none, respondents argue that petitioner's occupancy restriction is a "use" restriction and not an "occupancy" limitation. That argument ignores the fact that "occupancy" is a "use" and further ignores the fact that in ordinary usage restrictions limiting occupancy to single families are referred to as "occupancy" restrictions.

Nowhere in the FHA is there any mention or direct reference to local zoning ordinances. The wording of the FHA throughout consistently refers to the sale and rental or advertising and showing for sale and rental of dwelling houses, not to decisions of local zoning authorities. If Congress had intended that municipalities conform their zoning ordinances to make reasonable accommodations for handicapped persons, it could, should and would have done so.

Respondents rely heavily on their construction of a single sentence in a document issued by a single committee of a single house to change the plain meaning of the FHA. The sentence refers to limitations that apply to all occupants. A proper reading of the sentence in the House

Report refers only to limitations by governments that treat handicapped persons differently.

The Court of Appeals argues that exempting petitioner's occupancy restriction would undermine the purposes of the FHA by insulating single family residential zones from the sweep of FHA requirements. That analysis ignores the fact that the FHA expressly excludes from coverage the sale or rental of a single family house where the owner does not own more than three single family houses. Congress itself has chosen to insulate single family houses.

Finally, zoning is a municipal function. It may be the most essential function performed by local government. If Congress intends to pre-empt the historic powers of the States, it must make its intention to do so unmistakably clear in the language of the statute. Such an intention is far from clear in the language of the FHA.

ARGUMENT

1. The Plain Language Of The Exemption Encompasses Petitioner's Occupancy Limitations.

a. The FHA exempts "any" "restrictions regarding the maximum number of occupants permitted to occupy a dwelling."

Congress passed the FHA as Title VIII of the Civil Rights Act of 1968, Pub. L. 90-284, 82 Stat. 81. The original FHA applied to "discrimination in the sale or rental of housing" on account of "race, color, religion, sex or

national origin." 42 U.S.C. 3604. Congress extended protection to handicapped persons in the Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, §§ (a) and (b)(1), 102 Stat. 1620-1622. The amendments make it unlawful to "discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap of . . . that buyer or renter." 42 U.S.C. 3604(f)(1)(A). Prohibited discrimination under the FHA includes "a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling." 42 U.S.C. 3604(f)(3)(B). The FHA exempts certain regulations:

> Nothing in this subchapter limits the applicability of *any* reasonable local, State, or Federal *restrictions* regarding the maximum number of occupants permitted to occupy a dwelling.

42 U.S.C. 3607(b)(1) (emphasis added).

The question is whether the amendments, which do not appear to be ambiguous as to the issues in this case, impose upon local zoning authorities any duty to alter zoning ordinances and regulations or to provide reasonable accommodations to a handicapped person living in a private single family dwelling. This is solely a matter of statutory interpretation.

b. The exemption expressly applies to "any" reasonable maximum occupancy restriction.

The plain language of the exemption encompasses petitioner's occupancy restriction. The exemption by its

express terms exempts "any"[1] reasonable maximum occupancy restriction. The language does not limit its terms to "absolute" maximum occupancy limitations. As Justice Blackman wrote, "[w]hen we find the terms of a statute unambiguous, judicial inquiry should be complete except in rare and exceptional circumstances." *Freytag v. Commissioner*, 111 S. Ct. 2631 (1991).

c. In ordinary usage, restrictions limiting occupancy to single families are referred to as "occupancy" restrictions.

The Court of Appeals argued that Edmonds Community Development Code ("ECDC") § 21.30.010 is not what is commonly referred to as an "occupancy" restriction, but rather is a "use" restriction, stating, "Edmonds reads the exemption broadly to include use restrictions, and Oxford House reads the exemption narrowly to cover only occupancy restrictions. The two differ." *City of Edmonds v. Washington State Building Code Council, et al.*, 18 F.3d 802, 804 n. 3 (1994). That analysis ignores the fact that "occupancy"[2] is a "use." That analysis further

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[1] The Random House Dictionary of the English Language, Second Edition, Unabridged (1987), defines "any" as "1. one, a, an, or some; one or more without specification or identification: *If you have any witnesses, produce them. Pick out any six you like.* 2. whatever or whichever it may be: *cheap at any price.* 3. in whatever quantity or number, great or small; some: *Do you have any butter?* 4. every; all: *Any schoolboy would know that. Read any books you find on the subject . . .* "

[2] The Random House Dictionary of the English Language, Second Edition, Unabridged (1987) defines "occupancy" to include "the use to which property is put."

ignores the fact that restrictions similar to ECDC § 21.30.010 are commonly referred to as "occupancy" restrictions.

The statute at issue in *Moore v. City of East Cleveland*, 431 U.S. 494 (1977), provided that "[t]he *occupancy* of any dwelling unit shall be *limited* to one, and only one, family . . . " *Moore v. City of East Cleveland*, 431 U.S. 494, 532 n. 1 (1977) (Stewart, J., dissenting) (emphasis added). The first sentence of the opinion states, "East Cleveland's housing ordinance, like many throughout the country, *limits occupancy* of a dwelling unit to members of a single family." *Moore v. City of East Cleveland*, 431 U.S. 494, 495-496 (1977) (emphasis added). The opinion then stated, "East Cleveland . . . has chosen to regulate the *occupancy* of its housing . . . " *Id.*, 431 U.S. at 498 (emphasis added).

Moreover, the concurring opinion of Justice Stevens, upon which respondents place heavy reliance, refers to the restriction as an "occupancy" limitation by stating, "attempts to *limit occupancy* to related persons have not been successful . . . " *Moore v. City of East Cleveland*, 431 U.S. 494, 516-517 (1977) (Stevens, J., dissenting).

Contrary to the argument of the Court of Appeals, in ordinary usage, ECDC § 21.30.010 is referred to as an "occupancy" restriction.

d. By citing a few snippets of legislative history, the Court of Appeals has chosen to "look[ ] over a crowd and pick[ ] out [its] friends."

The Court of Appeals relies almost exclusively for its decision on one sentence from H.R. Rep. No. 711, 100th Cong. 2d Sess. (1988). The House Report states, "[r]easonable limitations by governments would be allowed to continue, as long as they were applied to all occupants, and did not operate to discriminate on the basis of race, color, religion, sex, national origin, handicap or familial status."[3] H.R. Rep. No. 711, 100th Cong. 2d Sess. (1988). The Court of Appeals then argues that "[e]xempting Edmonds' zoning provision would contravene the Report's directive that exempted restrictions apply to all[4] occupants." *City of Edmonds v. Washington State Building Code Council, et al.*, 18 F.3d 809, 805 (9th Cir. 1994).

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[3] A proper reading of this sentence in the House Report refers only to limitations by governments that treat the listed persons differently than other occupants. If the Court of Appeals' argument is followed to its logical conclusion, a government could not prohibit commercial activity in a single family residential district. To ensure financial self sufficiency, and to ensure the ability to afford to reside in a single family home, handicapped persons must engage in commercial activity. Restrictions prohibiting commercial activity in single family residential zones apply only to commercial occupants and therefore do not apply to "all occupants." Clearly, Congress did not intend this result.

[4] The Court of Appeals focuses on the words "all occupants." If a Court is going to focus on a few words, it would seem to be more appropriate to focus on a few words in the statute itself, such as the words "any . . . restrictions."

Judge Harold Leventhal once said that citing legislative history is like "looking over a crowd and picking out your friends." Quoted in S. Breyer, *The 1991 Justice Lester W. Roth Lecture: On the Uses of Legislative History in Interpreting Statutes*, 65 S.Cal.L.Rev. 845, 845-46 (1992). Determining congressional intent by studying the legislative history and pronouncements of senators and congressmen during debate on particular legislation is at best an unsatisfactory method of statutory interpretation. *See, e.g. Conroy v. Aniskoff*, 113 S. Ct. 1562 (1993) (Scalia, J., concurring). Committee reports are unreliable evidence of what the voting members of Congress had in mind. *Blanchard v. Bergeron*, 489 U.S. 87 (1989) (Scalia, J., concurring).

That the Court of Appeals relied so heavily on its own construction of one sentence in a document issued by a single committee of a single house as the action *of Congress* displays an unrestrained use of legislative history. As Justice Scalia has stated,

> It is neither compatible with our judicial responsibility of assuring reasoned, consistent, and effective application of the statutes of the United States, nor conducive to a genuine effectuation of congressional intent, to give legislative force to each snippet of analysis . . . in committee reports that are increasingly unreliable evidence of what the voting Members of Congress actually had in mind.

Blanchard v. Bergeron, 489 U.S. 87, 99 (1989) (Scalia, J., concurring).

The District Court, after reading the same legislative history, concluded that the "plain language of this

exemption" encompassed the petitioner's occupancy limitation and that "[n]othing in the legislative history of the FHA require[d] a different interpretation." Pet. App. 96-106. The Court of Appeals for the Eleventh Circuit in *Elliott v. City of Athens, Ga.*, 960 F.2d 975 (11th Cir.), *cert. denied*, 113 S. Ct. 376 (1992) similarly concluded that nothing in the legislative history indicated an intent of Congress to interfere seriously with reasonable local zoning.

The Court of Appeals has cited a few snippets of legislative history to change the plain meaning of the statute.

e. If Congress had intended that municipalities conform their zoning ordinances to make reasonable accommodations for handicapped persons, it could, should and would have done so.

As Justice Scalia has stated,

> [t]he meanings of terms on the statute books ought to be determined, not on the basis of which meaning can be shown to have been understood by a larger handful of the members of Congress; but rather on the basis of which meaning is (1) most in accord with context and ordinary usage, and thus most likely to have been understood by the *whole* Congress which voted on the words of the statute (not to mention the citizens subject to it), and (2) most compatible with the surrounding body of law into which the provision must be integrated . . .

Green v. Boch Laundry Machine Co., 109 S. Ct. 1981, 1994 (1989) (Scalia, J., concurring) (emphasis in original).

Nowhere in the FHA is there any mention or direct reference to local zoning ordinances. No express duties are imposed upon municipalities to conform their local zoning ordinances and regulations to comply with any provision of the FHA. The wording of the FHA throughout consistently refers to the sale and rental or advertising and showing for sale and rental of dwelling houses, not to decisions of local zoning authorities.

Many cities in this country have adopted similar use restrictions. *City of Edmonds v. Washington State Building Code Council, et al.*, 18 F.3d 802, 806 (9th Cir. 1994); *Elliott v. City of Athens*, 960 F.2d 975, 980 (11th Cir.), *cert. denied*, 113 S. Ct. 376 (1992); *Moore v. East Cleveland*, 431 U.S. 494, 495-96 (1977).[5]

If Congress had intended that municipalities conform their zoning ordinances and regulations to make reasonable accommodations for handicapped persons, it could, should, and would have done so.

The Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, §§ (a) and (b)(1), 102 Stat. 1620-1622 maintained all of the protections of the FHA and added a lengthy subsection (f) that was expressly applicable only to handicapped

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[5] In *Moore v. City of East Cleveland*, 431 U.S. 494 (1977), the Supreme Court emphasized its reasons for protecting family living situations: "Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition. It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural." *Id.*, 431 U.S. at 503-504.

persons. In addition to the usual definitions of discrimination, the amendments included in subsection (f)(3) the following as constituting "discrimination":

> (A) a refusal to permit, at the expense of the handicapped person, reasonable modifications of existing premises occupied or to be occupied by such [handicapped] person if such modifications may be necessary to afford such person full enjoyment of the premises except that, in the lease or rental, the landlord may where it is reasonable to do so condition permission for a modification on the renter agreeing to restore the interior of the premises to the condition that existed before the modification, reasonable wear and tear excepted;
>
> (B) a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling.

42 U.S.C. 3604(f)(3)(A) & (B).

A proper reading of subsection (f)(3)(B) refers only to a refusal by landlords to make reasonable accommodations in rules, practices, et cetera.

In the sections immediately following the above-quoted subsection (B), the FHA expressly provides for state and "units of local general government" incorporating into their laws requirements for review and approval of the "design and construction of covered multi-family dwellings." 42 U.S.C. 3604(f)(5). Those sections further provide that the "Secretary [of Housing and Urban Development] shall encourage, but may not require, states and units of local government to include in their

existing procedures for the review and approval of newly constructed covered multifamily dwellings . . . " 42 U.S.C. 3604(f)(5)(C).

Certainly if Congress was capable of specifying the extent of the duties and obligations of municipalities in building requirements and, in fact, did so as provided in various subsections of 42 U.S.C. 3604(f), Congress could and would have specified any duty with regard to local zoning requirements.

A few noteworthy general observations should be reiterated. First, as relevant to any of the present issues, the wording of the FHA appears to be neither excessively complex, vague, ambiguous, or unclear, absent some attempt to expand meaning beyond the plain content of the language. Second, by the statute's own wording, the FHA intended to provide fair housing throughout the United States, 42 U.S.C. 3602, by prohibiting discrimination in the sale and rental of housing, 42 U.S.C. 3603(a) and 3604(f). Finally, the statute does not by its express words impose any obligation upon municipalities to alter or make exceptions to existing zoning ordinances or regulations.

f. The FHA expressly excludes from coverage the sale or rental of a single family house.

The Court of Appeals argues that exempting Edmonds' ordinance as an occupancy restriction would undermine the purposes of the FHA because "[a]pplying the exemption would insulate those single-family residential zones from the sweep of FHA[ ] requirements." *City of Edmonds v. Washington State Building Code Council,*

et al., 18 F.3d 802, 806 (9th Cir. 1994). That analysis ignores the fact that the FHA expressly excludes from coverage the sale or rental of a single family house where the owner does not own more than three single family houses. 42 U.S.C. 3603(b). That exclusion provides:

> (b) Nothing in section 3604 of this title (other than subsection (c)) shall apply to
>
> > (1) any single family house sold or rented by an owner provided that such private individual owner does not own more than three such single family houses at any one time [with further provisos not relevant to the issues in this case].

42 U.S.C. 3603(b).

Landlords who do not own more than three single family houses are not required to make any accommodation, reasonable or otherwise. The statute by its wording exempts "any single family house" that otherwise qualifies for the exemption. Neither the house nor the owner is subject to FHA requirements. It appears illogical to contend that nevertheless Edmonds must alter its zoning ordinance to provide reasonable accommodations to handicapped persons living in private single family dwellings.

It makes no sense to argue that Edmonds' single family zoning would undermine the purposes of the FHA by insulating single family residential zones from the sweep of FHA requirements, where Congress itself has chosen to insulate single family houses from the sweep of FHA requirements.

2. If Congress Intends To Pre-Empt The Historic Powers Of The States, It Must Make Its Intention To Do So Unmistakably Clear In The Language Of The Statute.

Our Constitution establishes a system of dual sovereignty between the States and the Federal Government. This Court also has recognized this fundamental principle. In *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990), the Court "beg[a]n with the axiom that, under our federal system, the States possess sovereignty concurrent with that of the Federal Government, subject only to limitations imposed by the Supremacy Clause." Over a hundred years ago, the Court described the constitutional scheme of dual sovereigns:

> [T]he people of each State compose a State, having its own government, and endowed with all the functions essential to separate and independent existence, . . . "[W]ithout the States in union, there could be no such political body as the United States." Not only, therefore, can there be no loss of separate and independent autonomy to the States, through their union under the Constitution, but it may be not unreasonably said that the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government. The Constitution in all its provisions, looks to an indestructible Union, composed of indestructible States.

Gregory v. Ashcroft, 111 S. Ct. 2395, 2399 (1991), quoting *Texas v. White*, 7 Wall. 700, 725, 10 L.Ed. 227 (1869) and *Lane County v. Oregon*, 7 Wall. 71, 76, 19 L.Ed. 101 (1869).

The Constitution created a Federal Government of limited powers. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. Amdt. 10. The States thus retain substantial sovereign authority under our constitutional system. *Gregory v. Ashcroft*, 111 S. Ct. 2395 (1991).

The "constitutionally mandated balance of power" between the States and the Federal Government was adopted by the Framers to ensure the protection of "our fundamental liberties." *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985), quoting *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 572 (1985) (Powell, J., dissenting). Just as the separation and independence of the coordinate Branches of the Federal Government serves to prevent the accumulation of excessive power in any one Branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.

James Madison explained the point:

> In a single republic, all the power surrendered by the people is submitted to the administration of a single government; and the usurpations are guarded against by a division of the government into distinct and separate department. In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.

The Federalist No. 51, p. 323 (C. Rossiter ed. 1961) (J. Madison).

This case implicates a state constitutional provision through which the people of Washington authorize the cities of Washington to make and enforce zoning regulations. Article II, § 11 of the Washington Constitution provides "[a]ny county, city, town or township may make and enforce within its limits all such police, sanitary and other regulations as are not in conflict with general laws." *See, Nelson v. City of Seattle*, 64 Wash.2d 862, 395 P.2d 82 (1964). Zoning is a state and municipal function. *See, Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 389 (1926); *Berman v. Parker*, 348 U.S. 26, 34-35 (1954).

The city has undisputed constitutional power to ordain single-family residential occupancy. *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). This Court has expressed the importance of this municipal function:

> [Z]oning is a complex and important function of the State. It may indeed be the most essential function performed by local government, for it is one of the primary means by which we protect that sometimes difficult to define concept of quality of life.

Village of Belle Terre v. Boraas, 416 U.S. 1, 13 (1974) (Marshall, J., dissenting).

Congressional interference with this decision of the people of Washington authorizing the cities of Washington to make and enforce zoning regulations would upset the usual constitutional balance of federal and state powers. For this reason, "it is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides" this balance. *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 243. This Court explained recently:

> [I]f Congress intends to alter the "usual constitutional balance between the States and the Federal Government," it must make its intention to do so "unmistakably clear in the language of the statute." *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 [105 S. Ct. 3142, 3147, 87 L.Ed.2d 171] (1985); see also *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 99 [104 S. Ct. 900, 907, 79 L.Ed.2d 67] (1984). *Atascadero* was an Eleventh Amendment case, but a similar approach is applied in other contexts. Congress should make its intention "clear and manifest" if it intends to pre-empt the historic powers of the States, *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 [67 S. Ct. 1146, 1152, 91 L.Ed. 1447] (1947) . . . "In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." *United States v. Bass*, 404 U.S. 336, 349 [92 S. Ct. 515, 523, 30 L.Ed.2d 488] (1971).

Gregory v. Ashcroft, 111 S. Ct. 2395, 2401 (1991), quoting *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 65 (1989).

This plain statement rule is nothing more than an acknowledgement that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere. *Gregory v. Ashcroft*, 111 S. Ct. 2395, 2401 (1991).

In *Gregory v. Ashcroft*, 111 S. Ct. 2395 (1991), the issue was whether Missouri State court judges are "appointees on the policy making level" and therefore exempted from the Age Discrimination in Employment Act's ("ACDEA") general prohibition of mandatory retirement. The dissent argued that Congress has expressly extended the coverage of the ACDEA to the States and their employees, and that the only dispute is over the precise details of the statute's application. *Gregory v. Ashcroft*, 111 S. Ct. 2395, 2409 (White, J., dissenting). The majority rejected that argument and extended the plain statement approach. Similarly, even though certain provisions of the FHA may cover states and their political subdivisions, this is a very important issue. One-family or single-family detached residence districts are a well-recognized fact of use zoning regulations. As David M. Burch and Scott M. Ryals wrote:

> The single-family zoning district has become the hallmark of modern American land use control. Justice Sutherland's opinion in *Village of Euclid v. Ambler Realty Co.*, [262 U.S. 365 (1926)], literally bristles with disdain for apartments and those who live in them. He likens apartment houses to "mere parasites" that feed upon the light, fresh air, and open spaces of the single-family district. From this exalted position, the single-family zone and its protection have tended to dominate local land use decision-making.

D. Burch and S. Ryals, *Land Use Controls: Requiem for Zoning and Other Musings on the Year 1982*, 15 Urban Law. 879, 880 (1983).

The right to establish such highly restricted districts has been well settled for years. *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974).

The definition of "family" is essential to zoning district regulation. Many local legislatures have redefined the term "family" to exclude groups of unrelated persons from occupying dwellings in districts restricted to single-family use. R. Anderson, *American Law of Zoning*, § 9.30 (1986).

If Congress intends to pre-empt the historic powers of the States, it must make its intention to do so unmistakably clear in the language of the statute. That intention certainly is not clear in the language of the FHA.

CONCLUSION

For the foregoing reasons, Amicus Curiae submits that the Order of the Court of Appeals for the Ninth Circuit should be reversed and the judgment of the District Court affirmed.

Respectfully submitted,

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